No. 20093

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROY HUNTER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION

BRIEF FOR THE APPELLEE

EDWIN L. WEISL, JR.,
Assistant Attorney General.

MANUEL L. REAL,
United States Attorney,
Los Angeles, California, 90012.

JAMES R. AKERS, JR.,
Assistant United States Attorney,
Los Angeles, California, 90012.

ROGER P. MARQUIS,
CARL L. SANDSTROM,
Attorneys, Department of Justice,
Washington, D. C., 20530.

I N D E X

CITATIONS

Cases:

Cases cont'd: Page

Constitution, Statutes and Regulations:

titution, Statutes and Regulations cont'd: Page

ellaneous:

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20093

ROY HUNTER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION

BRIEF FOR THE APPELLEE

OPINION BELOW

The district court's memorandum opinion and order, dated October 21, 1964 (C.T. 74-81),[1/] is reported at 236 F.Supp. 178.

JURISDICTION

This action to perpetually enjoin appellant from causing cattle under his control to graze or water within the

---

1/ The original papers transmitted to the Court and the reporter's transcript are in two separate volumes and will be referred to in this brief as the Clerk's transcript (C.T.) and the Reporter's transcript (R.T.), respectively.

Death Valley National Monument was initiated by the United States. The district court had jurisdiction under the provisions of 28 U.S.C. sec. 1345. On January 12, 1965, judgment was entered for the United States (C.T. 87). Notice of appeal was filed on March 10, 1965 (C.T. 96). Jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether, even assuming the existence of a right to water livestock at springs and water holes on the public domain, grazing livestock on the public domain without a permit is illegal.

2. Whether the laws of the United States and the local customs, laws, and court decisions of California recognize the acquisition of appropriative rights to springs and water holes on the public domain for stock watering purposes.

STATUTES, PRESIDENTIAL PROCLAMATIONS, RULES AND REGULATIONS INVOLVED

The statutes, Presidential Proclamations and rules and regulations involved in this case are set forth in Appendix.

STATEMENT

By Presidential Proclamation dated February 11, 1933, he Death Valley National Monument was established to preserve he unusual features of scenic, scientific and educational in-erest contained in certain lands known as Death Valley, Califor-.a. Prior to the establishment of the Monument, the lands in-luded therein were part of the public domain owned by appellee nd were included in the said Monument subject to all vested xisting rights.

Supervision, management and control of the lands sit-ated within the Monument were delegated by the President to the irector of the National Park Service, under the supervision of he Secretary of the Interior, as provided in the Act of August 25, 916 (39 Stat. 535-536), and acts additional thereto and amenda-ory thereof. Under this statute the Secretary of the Interior ay, under such rules and regulations and on such terms as he may rescribe, grant the privilege to graze livestock within any ational park (except Yellowstone), monument or reservation.

Section 3, 39 Stat. 535, as amended (16 U.S.C. sec. 3). Without a permit from an authorized officer or employee of the National Park Service, the running at large, herding, driving across, or grazing of livestock of any kind on government lands in the parks and monuments is prohibited. 36 C.F.R. sec. 1.20.

The undisputed facts are that for many years appellant has continuously grazed and watered cattle on the Monument, although he has never had or applied for a permit from appellee authorizing him to do so. Appellant and his predecessor were repeatedly notified by appellee, through the Superintendent of the Park Service, Death Valley National Monument, that their cattle were trespassing on Monument lands, and were requested to remove the animals without delay. Appellant and his predecessor refused to comply with those requests and continued to water and graze their cattle within the boundaries of the Monument.

On July 3, 1962, appellee filed a complaint asking that appellant be perpetually enjoined from watering and grazing his cattle on the Monument. Appellant's defense was, in short, that he needed no permit to graze on these public lands but he had,

claimed, a right to water cattle which carried with it an plied right to graze. Trial was held before the court on ly 16, 1964, and on October 21, 1964, the district court's morandum and order granting the injunction and directing ap- llee to prepare and lodge findings of fact, conclusions of w and form of judgment were filed. At a hearing on November 16, 64, appellant's objections to the proposed findings of fact sub- tted by appellee were sustained and appellant was granted leave propose amendments to the proposed findings of fact. The urt further granted appellant a stay of execution pending ap- al pursuant to Rule 62(a), F.R.Civ.P. On January 12, 1965, e findings of fact, incorporating appellant's proposed amend- nts, and conclusions of law were filed and entered. On that me date, judgment perpetually enjoining appellant from water- g and grazing cattle under his control within the boundaries the Death Valley National Monument and staying execution un- l the expiration of the period for the taking of an appeal was led and entered. This appeal followed.

SUMMARY OF ARGUMENT

I

In the absence of a permit granted by the United States grazing of cattle or other livestock within the boundaries of the Death Valley National Monument is prohibited. Rights of way for grazing livestock on public or reserved land of the United States are not incidental to water rights and such rights of way will not be implied from legislation recognizing rights of way for the construction of ditches, pipe lines, canals or reservoirs.

II

The water rights to be protected under the Act of 1866 and the Desert Land Act of 1877 are rights thereby authorized to be established in accordance with local customs, laws and court decisions. In California the local customs, laws and court decisions do not recognize acquisition of appropriative rights to springs and water holes on the public domain for stock watering purposes. Neither do the relevant acts of Congress.

ARGUMENT

I

REGARDLESS OF EXISTENCE OF CLAIMED WATER RIGHT, APPELLANT'S GRAZING IN THE DEATH VALLEY NATIONAL MONUMENT WITHOUT LICENSE IS ILLEGAL

Appellant argues that he has vested appropriative rights to water cattle from certain springs on the National Monument and that inseparably connected to those rights is the right, in the nature of an easement or right of way, to graze cattle on the public lands surrounding those springs. We submit that neither appellant nor his predecessors could have obtained a vested right of way over and across public lands for grazing and watering cattle thereon, even if it were assumed that they could have and did acquire a right to use the water.

Since 1934, the extent of rights of grazing of cattle on public lands has been controlled by the Taylor Grazing Act, 48 Stat. 1269 (1934), 43 U.S.C. sec. 315 et seq. Prior to the Taylor Grazing Act, there was held to be an implied license, growing out of the custom of nearly a hundred years that the unreserved

public lands of the United States should be free to the people seeking to use them where such lands were left open and unenclosed, and no act of Government forbids such use. Buford v. Houtz, 133 U.S. 320, 326 (1890). However, failure of the United States to object to such use of public lands did not confer any vested right to graze which could not be withdrawn by a subsequent reservation of the public lands. Light v. United States, 220 U.S. 523, 535 (1910). By the passage of the Taylor Grazing Act, and by the reservation of the Death Valley Monument, any "implied license" to graze was revoked in favor of a statutory permit system. As pointed out in Osborne v. United States, 145 F.2d 892, 896 (C.A. 9, 1944), "It is safe to say that it has always been the intention and policy of the government to regard the use of its public lands for stock grazing, either under the original tacit consent or * * * under regulation through the permit system, as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation. Indeed, concessions to individuals for the use of public property or the enjoyment of rights peculiar to the sovereign have been

consistently construed with strictness against the concessionee and in favor of the sovereign."

With respect to the public domain, the Constitution vests in Congress the power of disposition and making of all needful rules and regulations. That power is subject to no limitation. Utah Power & Light Co. v. United States, 243 U.S. 389 (1916). The Death Valley National Monument was established by Presidential Proclamation on February 11, 1933, pursuant to Section 2 of the Act of Congress approved June 8, 1906 (34 Stat. 255), and the Director of the National Park Service, under the direction of the Secretary of the Interior, was delegated the supervision, management and control of the Monument, as provided in the Act of Congress entitled "An Act to Establish a National Park Service, and for Other Purposes," approved August 25, 1916 (349 Stat. 535-536), and Acts additional thereto or amendatory thereof. 16 U.S.C. sec. 3. Pursuant to the authority of the Act of August 25, 1916, as amended (16 U.S.C. sec. 6), 36 C.F.R. 1.20, was promulgated and provides in part as follows:

> (a) The running at large, herding, driving across, or grazing of livestock of any kind on government lands in the parks and monuments is prohibited, except where authority therefor has been granted pursuant to a revocable permit issued by an authorized officer or employee of the National Park Service * * *.

This regulation was plainly valid and controls this case. As appellant has no permit from the Federal Government, he has no right to graze and water livestock on the National Monument.

The alleged existence of an appropriative water right does not enlarge appellant's rights. An appropriation of water purportedly made and maintained under the laws of California, gives no right of way over the public lands of the United States for a reservoir or canal to use water, United States v. Rickey Land & Cattle Co., 164 Fed. 496 (C.C. N.D. Cal. 1908), and this although the particular circumstances be such that the proposed appropriation cannot be effected without the ditch or reservoir. Snyder v. Colorado Gold Dredging Co., 181 Fed. 62, 69 (C.A. 8, 1910). A right of way across state lands in order to appropriate water will not be implied from the provisions of the state law allowing appropriation of water. State of California v. Hansen, 189 C.A.2d 604 (1961).

The lands herein involved are and at all times pertinent hereto have been owned by the United States. The power "to dispose of and make all needful rules and regulations respecting" the lands of the United States is given exclusively to the Congress (Constitution, Art. IV, sec. 3, cl. 2) and only through some form of exercise of that power can rights in lands belonging to the United States be acquired. Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1916). As this Court recently held in Superior Oil Company v. United States, F.2d (C.A. 9, 1965),[2/] easements are not to be implied in derrogation of the interest of Congress.

Here Congress has spoken expressly as to grazing rights in the Taylor Grazing Act. As to other easements needed to promote the development of water found in the public domain, in 1866 it recognized rights of way for the construction of ditches, pipe lines and canals. 14 Stat. 253, sec. 9; Rev. Stat. sec. 2339,

---

2/ Copies of this unreported opinion are transmitted with this brief to counsel for appellant.

July 26, 1866, 43 U.S.C. sec. 661. This legislation, known as the Act of 1866, was amended in 1870 to provide that patents or homestead rights should be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection therewith, as may have been acquired or recognized by Section 9 of the Act of 1866. 16 Stat. 218; Rev. Stat. sec. 2340 (July 9, 1870), 43 U.S.C. sec. 661. Nowhere in these statutes is there a recognition of rights of way across public land for cattle to graze and water. No court which has been called upon to interpret this legislation has rendered a decision recognizing or even indicating the possibility of recognition of a right of way in the nature of that claimed by appellant

Subsequently, when hydroelectric power was developed, it was found that this legislation was, at best, poorly adapted to these needs. The statutes were limited to ditches, canals and reservoirs, and did not cover power houses, transmission line or the necessary subsidiary structures. In that situation Congress passed the Act of May 14, 1896, c. 179, 29 Stat. 120, which

related exclusively to rights of way for electric power purposes. Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1916). Grazing and watering of cattle, however, unlike works for generating and distributing electric power, were known and should have been in the mind of Congress at the time the Acts of 1866 and 1870 were passed, yet no provision was made in those Acts for rights of way for such purpose. Although Congress has since passed a number of Acts specifically relating to rights of way, such as the 1896 Act mentioned above, none of them has provided for rights of way for grazing or watering livestock. The words of the Act of 1866 have been interpreted as being broad enough to include dams, flumes, pipes and tunnels on the theory that such dams, flumes, pipes and tunnels were analogous to or incidental to and discharging the functions of such reservoirs, ditches and canals. Utah Light & Traction Co. v. United States, 230 Fed. 343, 345 (C.A. 8, 1915), cited in Peck v. Howard, 167 P.2d 753, 761 (Cal. 1946). Those words are not, however, broad enough to include rights of way for watering and grazing livestock.

Appellant's argument is thus fallacious because (1) it violates the policy of Congress explicitly to state which easements to reach water will be permitted in the public domain and on what terms, (2) it violates the basic policy of public disposal requiring specific statutory authority resulting in patent expressly stating the scope of the grant, (3) it would create, by implication, limitations upon grants made under the general land disposal laws and (4) it would transfer to the courts by drawing implications the function of determining the scope of public land grants which Congress has always determined for itself or delegated to the Secretary of the Interior.

II

APPELLANT HAD NO VESTED WATER RIGHT AS CLAIMED

Before the establishment of the Death Valley National Monument, the lands included therein were part of the public domain and were included in the Monument subject to all valid existing rights. Prior to 1866, the right of a prior appropriator to the waters in the public domain had been recognized by

California as against other appropriators but not against the Federal Government. However, in 1866 Congress passed a statute, 14 Stat. 253, R.S., sec. 2339, 43 U.S.C. sec. 661 (hereafter referred to as the Act of 1866), providing that:

> Wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *.

In 1877, in the Desert Land Act (19 Stat. 377), Congress enacted what is the currently effective authorization for the acquisition, as against the United States, of privately owned rights to use the unappropriated, non-navigable, waters upon the public lands. See Federal Power Comm. v. Oregon, 349 U.S. 435, 447-448 (1954). There it was provided that (43 U.S.C. sec. 321):

> * * * and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

Neither the Act of 1866, nor the Desert Land Act specified the procedure by which rights could be acquired from the United States. However, in California, as in other states to which these laws applied, the local customs, laws and decisions of courts were accepted as the criteria for determining the acquisition of privately owned appropriative rights to use the waters on the federally owned public lands. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). Appellant argues that, in accordance with the local customs, laws and decisions of courts, he and his predecessors acquired vested appropriative rights to use certain waters located within the boundaries of the Death Valley National Monument.

There are at least four reasons why appellant's argument is wrong. First, a vested right to the use of water cannot be acquired for any purpose unless the appropriator has or has acquired a right in the adjacent lands as necessary to give him access to the water. State of California v. Hansen, 189 C.A.2d 604 (1961). Snyder v. Colorado Gold Dredging Co., 181 Fed. 62, 70 (C.A. 8, 1910). As demonstrated under Point I above, neither

appellant nor his predecessors have ever acquired such a right in the lands which must be traversed by his cattle to have access to the waters, the right to use which he claims to own.

Second, appellant's claim of vested right to the water must rest completely in the appropriative doctrine. The United States was and is the owner of all riparian land. Thus, appellant's argument that it acquired vested appropriative rights without ownership of any property benefited is novel and contrary to basic water law.

Third, in order for the appellant or his predecessors to have acquired vested appropriative rights to the waters in question, those waters had to be subject to appropriation. We submit that under the local customs, laws and court decisions of the State of California the waters in question were not subject to appropriation.

In 1911 the California legislature defined water subject to appropriation, and provided that all water flowing in any natural channel, except so far as it has been or is being

applied to use for beneficial purposes, or insofar as it may be reasonably needed for use for beneficial purposes on lands riparian thereto, or except as otherwise appropriated, is public water of the State subject to appropriation in accordance with statutory provisions. Wat. Code sec. 102 (formerly part of C.C. sec. 1410). Prior to passage of that Act, the California laws had permitted the acquisition by appropriation of the right to the use of running water flowing in a river or stream or down a canyon or ravine. Cal. Civ. Code 1874, sec. 1410.

Appellant claims to have acquired vested appropriative rights to use the waters of 26 springs and one small creek that flows a short distance before disappearing into the ground. In his opening brief, he states that water from springs may be appropriated (Appellant's opening brief, 36). This statement is too broad. Whether waters of a spring are subject to appropriation under California law depends on the nature of the particular spring. A water right is a usufructuary right, i.e., a right to use the water that will be regarded and protected as property,

but which carries with it no specific property in the water itself. Wiel, Water Rights in the Western States (3d ed.) sec. 18. However, under certain circumstances the California courts have declared that the owner of the land on which a spring is located actually owns the water flowing from that spring. In the case of Simons v. Inyo Cerro Gordo Mining & Power Co., 192 Pac. 144, 150 (Cal. 1920), the Circuit Court of Appeal, Second District, Division 2, California, made the following statement:

> There no more could be private ownership in the springs themselves than there could be private ownership in the corpus of a stream of running water. There could be but a usufructuary right. And that right could be acquired only by an "appropriation" made in the manner provided by law; that is by reducing the water to actual possession for a beneficial use.

In denying a petition for rehearing in that same case, the California Supreme Court, sitting en banc, declared:

> We also refuse to approve the broad statement that there cannot be a private ownership in springs of water. The case is not parallel to the question of the ownership of the water of a stream. A spring may have no natural outlet, in which case the owner of the land in which it lies, under ordinary circumstances, owns the water as completely as he does the soil. I.D. at 152. (Emphasis added.)

On this same point the California Supreme Court said in a later case, San Francisco Bank v. Langer, 110 P.2d 687, 689-690 (Cal. 1941):

> Irrespective of its source, water from a spring flowing into a water course is part of its natural flow and its use is governed by the doctrine of riparian rights. It follows that the owner of land upon which a spring rises and from which a stream flows has no absolute ownership of the waters in the spring, but is entitled only to a reciprocal share, as a riparian owner, in common with other owners farther down on the stream. But where the natural flow from a spring does not pass beyond the boundary of the land on which it is located, the owner may use all of it; he owns it as completely as he owns the soil. (Emphasis added.)

In a recent California case, the defendant had discovered a spring in a ravine on a section of state-owned land in the desert area of Kern County. The terrain in the area was hilly and rugged, apparently quite similar to the land involved in this case. Water from the spring did not flow off the state land but merely moistened the ground thereabouts; and was not the source of any water course. Defendant went on the state land, without a permit, and spent a large amount of money developing the sprin

and laying a pipe line across state land to his own land, which surrounded the state land. The state brought an action to enjoin the defendant. The injunction was granted and the defendant appealed. In affirming the judgment, the District Court of Appeal, Fourth District, concluded that: This was a spring with no natural outlet; the owner of the land in which it lies, under ordinary circumstances, owns the water as completely as the soil, citing Simons v. Inyo Cerro Gordo Mining & Power Co., supra, and San Francisco Bank v. Langer, supra; and the waters of the spring were not subject to appropriation. State of California v. Hansen, 11 Cal. Rptr. 335, 339, 189 C.A.2d 604, 610 (1961). See also York v. Horn, 154 C.A.2d 207, 213 (1957). Appellant's position is, of course, much weaker than that of the claimant in Hansen who at least owned the land where the water was used.

Counsel for appellant, in his opening argument before the district court, used the following picturesque language in describing the waters in the case at bar (R.T. 8-9):

> * * * [W]hen we speak of spring water in the Western states, we aren't talking about artesian wells, such as we may read in English poetry,

> but we're talking of mudholes, * * *. This was surface water that seeped out of the ground, maybe a half-gallon, maybe a quarter-gallon and, if it was a good spring, maybe a gallon a minute. This water would seep out if it were to be used. You had to gather the water. You had to let it form a pool and then you had to transport or divert that water to some kind of a tank or a trough where livestock could drink out of it. If you didn't do that, this water was lost. In a short time it goes into mud and would disappear into the ground.

Appellant himself testified before the district court that the springs produced very limited amounts of water which if not collected in a tank or trough would "form a kind of mudhole and disappear into the sand" (R.T. 36, 38-39) and that the so-called Cottonwood Creek also produces a limited amount of water and flows a brief distance before sinking into the ground and disappearing within the boundaries of the National Monument (R.T. 18, 46, 53).

The record here evidences the fact that the waters in this case are identical to those involved in the Hansen case, supra. They have no natural outlet, they do not pass from appellee's lands, and they are not part of a water course. These waters are not subject to appropriation, under California law,

and it is therefore impossible for appellant or his predecessors to have acquired any vested appropriative water rights under that law as it is claimed they did.

The fourth defect in appellant's claim of vested water rights for stock raising in the springs is the fact that Congress and, so as appears, the State of California 3/ have assumed that rights to such waters are not subject to appropriation.

3/ That the State of itself is without authority or power to authorize the acquisition of rights as against the United States to use the waters on the lands of the United States is clear from decisions of the Supreme Court of California and the Supreme Court of the United States. In Lux v. Haggin, 69 Cal. 255, 339, 10 Pac. 674, 721 (1886), the California court long ago recognized that "* * * since the act of Congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of Congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval." In United States v. Grand River Dam Authority, 363 U.S. 229 (1960), the Supreme Court, in denying the authority's claim that it had compensable water rights under an act of the Oklahoma legislature, declared: "Yet, the Federal Government was the initial proprietor in these western lands and any claim by a State or by others must derive from this Federal title."

Appellant places considerable emphasis on the case of Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 295 Pac. 772 (1931) But that case involved flowing streams not springs. Moreover, it is the local customs, laws and court decisions of the State of California, not those of Nevada, that are to be used in determining whether appellant or his predecessor can base a claim of appropriative water rights on local customs, laws and court decisions. Granted that the Steptoe case stands for the proposition that Nevada law permits the acquisition of appropriative water rights by watering livestock, but there are also cases in other states that hold the opposite. See, e.g., Robinson v. Schoenfeld 218 Pac. 1041 (Utah 1923).

Appellant also argues that under California law the watering of cattle is recognized as a reasonable, beneficial use (Appellant's opening brief, p. 26). However, both cases cited by appellant as authority for that statement involve the determination of water rights among riparian owners. A riparian owner has the right to use sufficient water from the stream to supply the needs of stock and animals ordinarily kept to sustain the

domestic needs of man. However, in a case in which a downstream riparian owner claimed that the use of water exclusively for watering livestock grown for commercial purposes was superior to the use of water for irrigation by an upstream riparian owner, the court was of the opinion that the riparian right to water livestock did not extend to watering livestock grown or pastured for commerical purposes and therefore the right of the downstream riparian owner to use the water for irrigation was superior. Cowell v. Armstrong, 210 Cal. 218, 224-225, 290 Pac. 1036 (1930). Although it does not say so in the decision, it would appear that the court recognized that under the local customs, laws and court decisions of California appropriative rights cannot be acquired by watering livestock. In any event, it is clear that California's determinations that riparian rights to use the waters of a flowing stream for some stockwatering purposes are not authority for the proposition that the laws of that State permit the acquisition by appropriation of the right to use the waters of the springs and water holes on the public lands for stockwatering purposes.

We have noted above that the Desert Land Act provides that the surplus waters on the public lands shall be "free for

the appropriation and use of the public for irrigation, mining, and manufacturing purposes." Supra, p. 15. The authorization plainly does not include grazing and stockwatering purposes at springs. While the precursor Act of 1866 did refer to "mining, agricultural, manufacturing, or other purposes," we think it is clear that Congress was never under any disillusionment that it had authorized the acquisition of privately owned rights to use springs and water holes such as here involved for the watering of livestock being grazed on the public lands. By the Act of December 29, 1916, 39 Stat. 862, 43 U.S.C. secs. 291-302, Congress provided for the making of stock-raising homestead entries upon the unappropriated unreserved public lands. By Section 10, 39 Stat. 865, 43 U.S.C. sec. 300, it was specifically directed:

> That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated [for entry] under this Act but may be reserved * * * and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe; * * *.

Authority to reserve additional lands to insure access "by the public" to the reserved watering places was also granted. In pursuance of the authority granted by Section 10 of the stock raising homestead act and Executive Order dated April 17, 1926, provided:

> It is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one-quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of section 10 of the Act of December 29, 1916 * * *, and in aid of pending legislation.

Had Congress supposed that it had theretofore authorized those persons permissively using the public lands for stock grazing to acquire private ownership of the right to use the waters of the springs and water holes, it is to be assumed that in authorizing the reservation "for public use" of the lands containing "water holes or other bodies of water needed or used by the public for watering purposes" it would have excepted such sources theretofore appropriated. It is therefore highly significant that no

such exception was made either by Section 10 of the 1916 Act or by the 1926 Executive Order implementing the authority thereby granted.

Absent a right in the public property, appellant's occupation was plainly illegal and the United States was entitled to an injunction preventing such continued violation of law. United States v. Langendorf, 322 F.2d 25 (C.A. 9, 1963); cf. Beay v. United States, F.2d (C.A. 9, 1965).[4/]

CONCLUSION

The judgment of the district court is correct and shoul be affirmed.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

MANUEL L. REAL,
United States Attorney,
Los Angeles, California, 9001

JAMES R. AKERS, JR.,
Assistant United States Attorne
Los Angeles, California, 9001

ROGER P. MARQUIS,
CARL L. SANDSTROM,
Attorneys, Department of Justic
Washington, D. C., 20530.

NOVEMBER 1965

4/ Copies of this unreported opinion are transmitted with this brief to counsel for appellant.

CERTIFICATE OF EXAMINATION OF RULES

I certify that I have examined the provisions of Rules 18 and 19, C.A. 9, and that in my opinion the tendered brief conforms to all requirements.

CARL L. SANDSTROM
Attorney, Department of Justice
Washington, D. C., 20530

APPENDIX

(1) Presidential Proclamation No. 2028, February 11, 1933, 47 Stat. 2554.

DEATH VALLEY NATIONAL MONUMENT -- CALIFORNIA

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS it appears that the public interest would be promoted by including certain lands known as Death Valley, in California, within a national monument for the preservation of the unusual features of scenic, scientific, and educational interest therein contained:

NOW, THEREFORE, I, HERBERT HOOVER, President of the United States of America, by virtue of the power in me vested by section 2 of the act of Congress entitled "AN ACT For the preservation of American antiquities," approved June 8, 1906 (34 Stat. 225), do proclaim and establish the Death Valley National Monument and that, subject to all valid existing rights, the area indicated on the diagram hereto annexed and forming a part hereo

be, and the same is hereby, included within the said national monument.

Warning is hereby expressly given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

The Director of the National Park Service, under the direction of the Secretary of the Interior, shall have the supervision, management, and control of this monument as provided in the act of Congress entitled "AN ACT To establish a National Park Service, and for other purposes," approved August 25, 1916 (39 Stat. 535-536), and acts additional thereto or amendatory thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this 11" day of February, in the year of our Lord nineteen hundred and thirty-three, and of the Independence of the United States of America the one hundred and fifty-seventh.

[SEAL]

HERBERT HOOVER

By the President:

Henry L. Stimson

Secretary of the State.

[No. 2028]

(2) Act of August 25, 1916, 39 Stat. 535, as amended (16 U.S.C. sec. 3)

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2, 4, 22, and 43 of this title shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months or both, and be adjudged to pay all costs of the proceedings. He may also, upon terms and conditions to be fixed by him, sell or dispose of timber in those cases where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any such park, monument, or reservation. He may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations. He may also grant privileges, leases, and permits for the use of land for the

accommodation of visitors in the various parks, monuments, or other reservations provided for under section 2 of this title, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public: Provided, however, That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze livestock within any national park, monument, or reservation referred to in this section and sections 1, 2, 4, 22, and 43 of this title when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park: And provided further, That the Secretary of the Interior may grant said privileges, leases, and permits and enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids: And provided further, That no contract, lease, permit, or privilege granted shall be assigned or transferred by such grantees, permittees, or licensees without the approval of

the Secretary of the Interior first obtained in writing: And provided further, That the Secretary may, in his discretion, authorize such grantees, permittees, or licensees to execute mortgages and issue bonds, shares of stock, and other evidences of interest in or indebtedness upon their rights, properties, and franchises, for the purposes of installing, enlarging or improving plant and equipment and extending facilities for the accommodation of the public within such national parks and monuments. (Aug. 25, 1916, ch. 408, §3, 39 Stat. 535; June 2, 1920, ch. 218, §5, 41 Stat. 732; Mar. 7, 1928, ch. 137, §1, 45 Stat. 235; May 29, 1958, Pub. L. 85-434, 72 Stat. 152.)

(3) Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. sec. 661 (1st paragraph)

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for

the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

(4) Act of July 9, 1870, 16 Stat. 218, 43 U.S.C. sec. 661 (2d paragraph)

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title.

(5) 36 Code of Federal Regulations Section 1.20

a. The running at large, herding, driving across, or grazing of livestock of any kind on the Government lands in the parks and monuments, or the use of such lands for agricultural purposes, is prohibited, except where authority therefor has

been granted pursuant to a revocable permit issued by an authorized officer or employee of the National Park Service. Applications for such authorization may be addressed to the superintendent of the area involved.

Section 1.91

a. Any person who violates any provision of the rules and regulations in this chapter, or as the same may be amended or supplemented, in regard to any national park or monument not specified in paragraph (b) or (c) of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $500 or imprisonment for no exceeding 6 months, or both, and be adjudged to pay all costs o the proceedings.

(6) Rule 65, Federal Rules of Civil Procedure

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDE

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall b specific in terms; shall describe in reasonable detail, and no

by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.